probability test used by the majority of other circuits. See *id.* at 22a.

b. Applying the reasonable probability standard, the court of appeals affirmed the district court's denial of petitioners' new trial motion with respect to the substitute billing counts. Pet. App. 22a-23a. The court explained that "Statler was really not a material witness with respect to the substitute billing counts" because "Statler did not testify about the propriety of substitute billing or [petitioners'] knowledge that such claims were prohibited. Rather, she testified about the frequency of ghost billing and upcoding." *Id.* at 22a. The court also rejected petitioners' contention that Statler's testimony might have affected the verdict on the substitute billing counts by diminishing petitioners' overall credibility in the eyes of the jurors. The court explained that the government had "presented substantial evidence that [petitioners] knew they were engaging in impermissible substitute billing." *Ibid.* Based on its review of the trial record, the court "d[id] not believe that the jury would have probably reached a different verdict on the substitute billing counts had Statler's testimony not been presented." *Id.* at 22a-23a.

5. On June 16, 2004, petitioners filed a petition for a writ of certiorari (No. 03-1668) seeking review of the court of appeals' decision. On January 12, 2005, while that petition was pending, this Court issued its decision in *United States* v. *Booker*, 125 S. Ct. 738. The Court held that the federal sentencing scheme enacted by Congress, under which the sentencing court rather than the jury finds facts that establish a mandatory Guidelines range, is inconsistent with this Court's Sixth Amendment precedents. *Id.* at 748-756. The Court further held that the constitutional infirmity was most appropri-

ately eliminated by severing the statutory provisions that mandate sentences within the applicable Guidelines range, leaving a sentencing scheme in which the Guidelines range is advisory and federal sentences are reviewable for reasonableness. *Id.* at 757-769. On January 24, 2005, the Court granted the petition for a writ of certiorari in No. 03-1668, vacated the judgment of the court of appeals, and remanded the case to the court of appeals for further consideration in light of *Booker*. Pet. App. 12a.

6. On remand from this Court, the court of appeals in turn remanded the case to the district court for reconsideration of petitioners' sentences. The district court, treating the Guidelines as advisory rather than mandatory, concluded that the same sentences it had previously imposed were "necessary and appropriate" for both petitioners. Pet. App. 7a (Mitrione), 8a (DeVore); see *id.* at 2a-9a. The court of appeals affirmed, explaining that petitioners' sentences "could not be viewed as unreasonable." *Id.* at 1a.

ARGUMENT

1. Petitioners contend (Pet. 7-19) that the Court should grant review to resolve a conflict among the circuits on the standard for granting a motion for a new trial based on evidence of perjury by a government witness. The Fourth and Sixth Circuits, relying on the Seventh Circuit's decision in *Larrison*, have held that a new trial should be granted in such cases if, without the false testimony, the jury "might" have reached a different conclusion. See *United States* v. *Wallace*, 528 F.2d 863, 866 (4th Cir. 1976) (adopting *Larrison* standard); *Gordon* v. *United States*, 178 F.2d 896, 900 (6th Cir. 1949) (same), cert. denied, 339 U.S. 935 (1950); see also *United*

States v. *Roberts*, 262 F.3d 286, 293 (4th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Willis*, 257 F.3d 636, 642-645 (6th Cir. 2001). Every other circuit to consider the issue, including the Seventh Circuit in this case, has held that a new trial is warranted only if the new evidence would probably produce a different verdict. See Pet. App. 21a-22a; *United States* v. *Petrillo*, 237 F.3d 119, 123-124 (2d Cir. 2000); *United States* v. *Williams*, 233 F.3d 592, 593-595 (D.C. Cir. 2000); *United States* v. *Huddleston*, 194 F.3d 214, 217-221 (1st Cir. 1999); *United States* v. *Sinclair*, 109 F.3d 1527, 1531-1532 (10th Cir. 1997); *United States* v. *Provost*, 969 F.2d 617, 622 (8th Cir. 1992), cert. denied, 506 U.S. 1056 (1993); *United States* v. *Krasny*, 607 F.2d 840, 844-845 (9th Cir. 1979), cert. denied, 445 U.S. 942 (1980). In a recent opinion, the Fifth Circuit also declined to apply the *Larrison* rule, noting that the Seventh Circuit in this case had overruled *Larrison*. *United States* v. *Wall*, 389 F.3d 457, 472 (5th Cir. 2004), cert. denied, 125 S. Ct. 1874 (2005).

The Fourth and the Sixth Circuits initially adopted the *Larrison* standard before this Court's holding in *United States* v. *Agurs*, 427 U.S. 97, 103 (1976), that convictions based on the knowing use of perjured testimony may be overturned only if there is a "reasonable likelihood" that the false testimony affected the verdict. Accord *Kyles* v. *Whitley*, 514 U.S. 419, 433 n.7 (1995). Since *Agurs*, no court of appeals has adopted the *Larrison* standard. Even before the Seventh Circuit's overruling of *Larrison* in this case, there had been "an unmistakable trend toward use of the probability standard" among the courts of appeals. *Huddleston*, 194 F.3d at 220. As the Seventh Circuit observed in *United States* v. *Mazzanti*, 925 F.2d 1026, 1029 (1991), "[t]he differ-

ence between *Larrison* and the more general formulation has become, over the years, more and more elusive, and * * * the differences in practical application are indeed becoming difficult to discern." This Court has recently denied other petitions for a writ of certiorari presenting the question whether the *Larrison* test or the probability standard is appropriate in these circumstances. See *Germosa* v. *United States*, 531 U.S. 1080 (2001); *Williams* v. *United States*, 529 U.S. 1131 (2000). There is no reason for a different result here.

Moreover, contrary to petitioners' contention (Pet. 10), there is no reason to suppose that petitioners would have been granted a new trial on the substitute billing counts even if the court of appeals had applied the *Larrison* standard. Consistent with *Larrison* (which was binding precedent within the Seventh Circuit at the time of the district court's ruling), the district court framed the relevant inquiry as "whether the verdicts *might* have been different either without the trial testimony of Ms. Statler, or if the jury had known that part of Ms. Statler's testimony was false." Pet. App. 57a (emphasis added); see *id.* at 60a (district court states that it is "giving the benefit of the doubt to [petitioners] in any instance where a charge was based in whole or in part on evidence where the verdict might have been influenced by the false testimony"). Applying that standard, the district court granted petitioners' motion for a new trial with respect to most counts of conviction, but denied the motion with respect to the substitute billing charges contained in Counts 12 and 14. See *ibid.* Nothing in the court of appeals' opinion suggests that the Seventh Circuit would have granted petitioners more extensive relief if it had applied the *Larrison* standard.

Petitioners also argue (Pet. 11-12) that the *Larrison* standard should apply in this case because Statler was a "member of the prosecution team." Petitioners did not advance that claim below, however, and the lower courts therefore had no occasion to address it. In any event, the fact that Statler discussed her testimony and the accompanying trial exhibit with government counsel (see Pet. 12) does not establish that Statler—an auditor with the Illinois Department of Public Aid (see Pet. App. 20a)—was a member of the prosecution team, such that knowledge of her perjury could be attributed to the government.

Petitioners also contend (Pet. 13-16) that the test used by the court of appeals in this case conflicts in principle with the materiality standard applied by this Court when the prosecution has concealed exculpatory material in violation of the rule announced in *Brady* v. *Maryland*, 373 U.S. 83 (1963). The district court found, however, that government counsel "did not knowingly put false testimony on at trial." Pet. App. 58a. Petitioners did not contest that finding on appeal, and the court of appeals decided the case on the understanding that "the government did not knowingly present the false testimony." *Id.* at 22a. The government's lack of prior knowledge of the pertinent newly discovered evidence distinguishes this case from *Brady* and its progeny.[2]

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[2] Petitioners' reliance (Pet. 13-14) on *Banks* v. *Dretke*, 540 U.S. 668 (2004), is misplaced. The Court in *Banks* simply applied the well-established standards of *Brady* and its progeny. See *id.* at 691. *Inter alia*, the Court in *Banks* reiterated that one of the "essential elements" of a *Brady* claim is that "evidence must have been suppressed by the State, either willfully or inadvertently." *Ibid.* (quoting *Strickler* v. *Greene*, 527 U.S. 263, 282 (1999)). In this case, petitioner has offered no basis for concluding either that the federal prosecutors were aware of

Even under the *Brady* standard, petitioners would not be entitled to relief. This Court has held that undisclosed exculpatory or impeachment evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). The Court has explained that "[a] 'reasonable probability' of a different result is * * * shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678). In this case, Statler's perjury does not undermine confidence in the guilty verdicts on the substitute billing counts because, as the courts below correctly found, Statler was not a material witness with respect to those counts.[3]

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the falsity of Statler's testimony, or that information showing the testimony to be false was contained in federal files.

[3] Petitioners contend (Pet. 14) that the practical effect of the standard applied by the court of appeals was to require them to demonstrate that, without Statler's testimony, the evidence would not have been legally sufficient to support a conviction on the substitute billing counts. That is incorrect. Requiring the defendant to show that the jury's verdict would probably have been different if perjured testimony had been excluded is not the same as requiring proof that no reasonable jury could have found the defendant guilty without the false testimony. Petitioners' reliance (Pet. 14-15) on *Mesarosh* v. *United States*, 352 U.S. 1 (1956), is also misplaced. In *Mesarosh*, this Court granted the defendants a new trial when the government acknowledged on appeal that its informant-witness had given false testimony in similar cases. See *id.* at 8-9. In *Mesarosh*, however, this Court found that it could not be determined conclusively by any court that the witness's testimony was insignificant in the general case against the defendants. *Id.* at 10-11. Here, by contrast, both the district court and the court of appeals found

2. Petitioners also argue (Pet. 19-23) that the reversal of their convictions on Counts 1 and 2 rendered their convictions on Counts 12 and 14 fundamentally unfair because the latter counts incorporated by reference the scheme to defraud alleged in Counts 1 and 2. That claim lacks merit and does not warrant this Court's review.

Counts 12 and 14, which charged petitioners with mail fraud and health care fraud, incorporated by reference paragraphs 1 through 8 of Count 2 (mail fraud), which in turn incorporated paragraphs 1 through 13 of Count 1 (conspiracy to commit health care fraud). See Pet. App. 35a-40a, 40a-41a, 48a-49a, 50a-51a. The incorporated portions of those counts provided background information concerning the Medicaid and Medicare programs, and set out the factual allegations regarding the scheme to defraud those programs (an essential element of mail fraud). The fact that certain general background facts were relevant to many of the charges contained in the indictment does not undermine the lower courts' determination that Statler's testimony bore only on the ghost billing and upcoding charges, not on the substitute billing counts.

Petitioners also invoke the principle that 'a conviction must be reversed when it is based on alternative legal theories, one of which is legally erroneous, and it is not possible to know the basis of the jury's decision." Pet. 21. That rule is irrelevant to this case. Petitioners do not contend that the jury was improperly instructed, nor do they suggest any other ground for inferring that the jury relied on an erroneous legal theory.

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that Statler's testimony was not germane to the substitute billing charges.

Petitioners' contention (Pet. 19-23) that they were deprived of their right to trial by jury also lacks merit. A properly instructed jury considered the relevant evidence and found petitioners guilty on the substitute billing charges. Petitioners' request for a new trial based on newly discovered evidence necessarily required the courts below to determine what verdict the jury would likely have reached if Statler's perjured testimony had not been admitted into evidence. Nothing in this Court's decisions suggests that the district court and court of appeals invaded the jury's province by engaging in that inquiry.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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